

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Hon. Peter J. Hoekstra, Presiding

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

v.

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

Supreme Court No. 146763

Court of Appeals No. 307616

Court of Claims No. 09-116 MZ(A)

BRIEF AMICUS CURIAE OF
MICHIGAN ASSOCIATION FOR JUSTICE

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III. QUESTION PRESENTED

Whether a person who suffers "bodily injury" within the meaning of the motor vehicle exception to governmental immunity, MCL § 691.1405, is entitled to recover economic damages in the form of wage loss resulting from that injury.

IV. INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. MAJ recognizes an obligation to assist this Court on important issues of law that may substantially affect the orderly administration of justice in Michigan trial courts. This case presents one such issue.

V. STATEMENT OF FACTS

Amicus Curiae Michigan Association for Justice adopts the statement of facts as presented by Plaintiff-Appellee Heather Lynn Hannay in this appeal.

VI. ARGUMENT OF AMICUS CURIAE

This Court's decision in *Wesche v Mecosta Co Rd Com'n*, 480 Mich 75; 746 NW2d 847 (2008) effectively narrowed the categories of persons who remain eligible to pursue claims for damages under the motor vehicle exception to governmental immunity. MCL § 691.1405. As the *Wesche* Court explained, loss of consortium is a separate and independent cause of action brought by a person who has not himself or herself suffered a "bodily injury," and therefore, governmental immunity is not waived for a person bringing a loss-of-consortium claim. *Id.*, at 79. Although we continue to question whether *Wesche* was decided correctly in this regard, we are not contesting that aspect of its holding for purposes of this appeal. But we do not believe the *Wesche* holding should be expanded to severely limit the damages otherwise available for a bodily injury suffered in a collision with a governmental motor vehicle. Yet this appears to be exactly what the Michigan Department of Transportation is asking the Court to do at this time.

In *Wesche*, the Court emphasized the fact that its decision rested in large part on the independent nature of a loss-of-consortium claim:

Although a loss-of-consortium claim is derivative of the underlying bodily injury, it is nonetheless regarded as a separate cause of action and not merely an item of damages. *Eide [v Kelsey-Hayes Co]*, 431 Mich 26, 37; 427 NW2d 488 (1988)]. The motor-vehicle exception does not waive immunity from this independent cause of action; the waiver of immunity is limited to claims for bodily injury and property damage.¹¹

11 Justice KELLY asserts that our application of the statutory text will lead to absurd results, but we respectfully disagree, particularly in light of the independent nature of a loss-of-consortium claim. We simply are not convinced that the Legislature's decision to waive immunity only for bodily-injury and property-damage claims, but not for independent loss-of-consortium claims, is absurd.

Wesche, 480 Mich at 85, n.11.

As found by the Court of Appeals, Ms. Hannay suffered shoulder injuries requiring multiple surgeries as a result of the accident, and there is no basis for disputing that she suffered a "bodily injury" within the meaning of the motor vehicle exception. *Hannay v Dept of Transp*, 299 Mich App 261, 263-64; 829 NW2d 883, *app gtd in part* 495 Mich 863 (2013). Ms. Hannay is not making a separate or independent claim, like the loss-of-consortium claim rejected in *Wesche*, but rather, she is simply making a claim for the damages resulting from the indisputable "bodily injury" she suffered. Now, however, defendant-appellant seems to argue that each item of Ms. Hannay's damages must also constitute a "bodily injury." The government seeks to use this stratagem to preclude a claim for wage loss in this case, but if accepted, this expansion of *Wesche* would apply broadly and absurdly. After all, "bodily injury" is not itself an item of damages, and Ms. Hannay's surgeries and other treatments were not themselves "bodily injuries." As further explained below, we do not believe this argument should survive the Court's scrutiny.

A. The Phrase "Liable for Bodily Injury" in MCL § 691.1405 Means that a Governmental Entity is Financially Responsible for All Damages Incurred as a Direct Result of Suffering a Bodily Injury

This Court must address—and provide definitive guidance—as to what the statutory directive "Governmental agencies shall be liable for bodily injury," contained in the Motor Vehicle Exception to Governmental Immunity, MCL § 691.1405, means in the context of recovering compensatory damages incurred as a direct result of a plaintiff suffering an uncontested physical injury. MAJ agrees with Plaintiff-Appellee's position that the most logical interpretation of § 1405 would allow a plaintiff to be compensated for all money (i.e. legal damages) that a defendant is financially obligated to plaintiff (i.e. is liable) for (i.e. on account of) the bodily injury that is compensable under the No Fault Act. The Court of Appeals decision should be affirmed.

Under the GTLA, a governmental agency is immune from tort liability when the agency is engaged in the exercise or discharge of a governmental function. MCL § 691.1407(1). This grant of immunity is subject to six statutory exceptions, including the motor vehicle exception, MCL § 691.1405, which provides in relevant part:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. . . .

According to this Court, “This language is clear: it imposes liability for “bodily injury” and “property damage” resulting from a governmental employee’s negligent operation of a government-owned motor vehicle. *The waiver of immunity is limited to two categories of damage: bodily injury and property damage.*” *Wesche, supra*, 480 Mich at 84 (emphasis added). “Bodily injury” is “a physical or corporeal injury to the body.” *Id.*, at 85. Thus, governmental agencies are liable for damages flowing from physical or corporeal injuries to the body.

Defendant-appellant relies on *Wesche* to argue that the GTLA limitation of liability to “bodily injury” damages immunizes defendant from liability for plaintiff’s claimed economic damages, because “economic damages” are not “a physical corporeal injury.” As plaintiff-appellee’s brief in this Court explains, the *Wesche* construction of the phrase “bodily injury” in MCL § 691.1405 is unduly restrictive. Amicus curiae Michigan Association for Justice adopts plaintiff-appellee’s argument to this effect.

However, even under the restricted reading of the term found in *Wesche*, the legal phrase “liable for bodily injury” allows recovery for any and all damages that are a consequence of sustaining a bodily injury. The Court of Appeals considered the merits of defendant-appellant’s argument and then expressly rejected its reading of the GTLA and the No-Fault act, reasoning:

In this case, defendant does not dispute that the no-fault act provides for the award of economic damages. Rather, now—more than 48 years since the GTLA

was enacted, during which time economic damages have presumably been routinely awarded—defendant argues that the language of the motor vehicle exception precludes awarding economic damages as provided pursuant to MCL § 500.3135(3)(c) because the damages recoverable pursuant to the motor vehicle exception are for the treatment of the bodily injury itself but not the broader damages associated with the bodily injury.

The only precedential authority that defendant cites that would suggest such a momentous change in the law is the definition of "bodily injury" as a "physical or corporeal injury to the body" that was announced in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 85; 746 NW2d 847 (2008). Applying this definition of bodily injury, defendant argues that the economic damages for work loss and loss of services are not recoverable because the GTLA's motor vehicle exception, MCL § 691.1405, waives liability only in regard to bodily injury or property damage as defined in *Wesche*. We conclude that defendant's reliance on *Wesche* in support of its position is misplaced.

The issue in *Wesche* was whether loss of consortium is recoverable against a governmental entity under the motor vehicle exception. *Wesche*, 480 Mich at 79. Applying a definition of bodily injury as being "a physical or corporeal injury to the body," the Court held that a loss-of-consortium claim is not recoverable because a loss of consortium is not a physical injury to the body, nor is a loss of consortium an item of damages derivative from the underlying bodily injury because loss of consortium has long been recognized as a separate, independent cause of action. *Id.* at 85.

In this case, it is clear, and defendant does not argue otherwise, that damages for work loss and loss of services are not independent causes of action, but are merely types or items of damages that may be recovered because of the bodily injury plaintiff sustained. Further, there is no dispute that plaintiff in this case sustained a bodily injury. Consequently, the holdings in *Wesche* are inapplicable to the issue in this case.

Hannay supra, 299 Mich App at 268-69.

This analysis takes into consideration the *Wesche* interpretation of the definitional words "bodily injury" and "damage," as well as the context of the words in the legal phrase "liable for bodily injury. . . damage." The Court of Appeals correctly determined that *Wesche* did not bar recovery of economic damages because, unlike the plaintiff in *Wesche*, here, plaintiff has undisputedly suffered a bodily injury. The Court of Appeals further explained the relationship of, and distinction between, injuries and damages:

[I]n this case, work-loss and loss-of-services damages are items of damages that arise from the bodily injuries suffered by plaintiff. To hold otherwise would conflate the actual-bodily-injury requirement for maintaining a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury. To the contrary, we hold that the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. Accordingly, work-loss benefits and benefits for ordinary and necessary services that exceed the statutory personal protection insurance benefit maximum pursuant to MCL § 500.3135(3) are awardable against governmental entities, and the trial court did not err by awarding those economic damages to plaintiff in this case.

Id., at 270.

Injuries are not damages, and damages are not injuries, but damages that result from injuries are compensable in tort. This does not seem overly complicated. “Liable for bodily injury” encompasses identifying the “types of damages recoverable as a result of bodily injury.” Thus, the focus of the analysis in determining bodily injury damages under MCL§ 691.1405 is whether the damages requested are to compensate for loss suffered as a result of bodily injury.

The Court also has granted leave to appeal in *Hunter v Sisco*, 300 Mich App 229; 832 NW2d 753 (2013), *app den* 495 Mich 898 (2013) *order vacated in part on reconsideration* 495 Mich 960 (2014) and *app gtd in part* 495 Mich 960 (2014), which raises the same issue presented in this case, only in the context of noneconomic damages. The *Hunter* Court held that a plaintiff cannot recover damages for pain and suffering and “shock and emotional damage” that are sustained as a direct result of suffering a bodily injury because “[s]uch damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception.” *Hunter*, 300 Mich App at 240-41. Significantly, unlike the *Hannay* decision, the *Hunter* opinion does not offer any meaningful analysis as to what a plaintiff can sue for under MCL § 691.1405, and the decision gives no guidance regarding interpretation of the phrase “liable for bodily injury.” *Id.*

Hunter is the counterpoint to *Hannay*. The two cases, while dealing with interpretation of the same exact statutory language, provide opposite analysis and reasoning. This Court should adopt and affirm *Hannay*, and reject the analysis set forth in *Hunter*. The *Hannay* interpretation takes into account not only the definitional words “bodily injury,” but also makes sense of the entire legal phrase “liable for bodily injury...damages” in the statute. The *Hannay* analysis is in keeping with established rules of statutory interpretation and gives full meaning to all the words in the statute. The *Hunter* interpretation of “liable for bodily injury,” on the other hand, is a radical and dangerous interpretation that ignores critical statutory language, ignores prior precedents, and has the dubious distinction of being the outlier opinion among all the States to hold that the phrase “liable for bodily injury” should be interpreted to preclude liability for economic and noneconomic damages incurred as a direct result of sustaining a bodily injury.

1. **The Hunter Analysis of “Liable for Bodily Injury”—The Counterpoint to The Analysis by the Court of Appeals in this Case—Is Dangerous and, Taken to Its Logical Conclusion, Renders MCL § 691.1405 Meaningless**

The *Hunter* analysis of what a governmental entity can be liable for is dangerous, and taken to its logical conclusion, completely immunizes governmental entities and makes the motor-vehicle exception to immunity, § 1405, meaningless.

Hunter provides the following distillation of the law regarding the meaning of the phrase “liable for bodily injury”:

Instead, in drafting MCL § 691.1405, the Legislature chose to specifically limit the waiver of immunity to bodily injury and property damage. Thus, the *Wesche* definition of “bodily injury” is clearly correct, regardless whether we view “bodily injury” as a legal term of art or consider its commonly understood meaning. Because “bodily injury” encompasses only “a physical or corporeal injury to the body,” *Wesche*, 480 Mich at 85, the trial court erroneously ruled that plaintiff may recover damages for pain and suffering and “shock and emotional damage.” Such damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception.

Hunter, 300 Mich App at 240-41.

The *Hunter* analysis does precisely what the *Hannay* panel warned against. *Hunter* "conflate[s] the actual-bodily-injury requirement for maintaining a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury." See, *Hannay*, 299 Mich App at 270. The *Hunter* analysis ignores the words "liable for" in the phrase "liable for bodily injury" contained in § 1405. This language must be read to make sense, and we believe it would be a misreading of *Wesche* to construe that decision as reformulating tort law by requiring damages to constitute injuries in order to be compensable. The Legislature understood the background concepts of tort law when it wrote § 1405, and it would be absurd to conclude that the Legislature meant to conflate damages with the injuries that cause them when writing the statute.

While the *Hunter* Court did review and agree with the *Wesche* definition of "bodily injury," no analysis is provided as to what liability for said bodily injury covers. Instead, *Hunter* makes the illogical leap from defining the term "bodily injury – the only relevant legal issue that was presented and adjudicated in *Wesche* – to holding that *damages* for pain and suffering and "shock and emotional damage" cannot be recovered under the motor vehicle exception because "[s]uch damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception." *Hunter*, 300 Mich App at 229 (emphasis added). This holding would lead to the conclusion that an injured person could sue under the motor vehicle exception, but the injured person could not recover *any* damages, because damages "do not constitute physical injury." *Id.*

While the *Hunter* decision deals with noneconomic loss caused by a bodily injury, there is nothing intrinsic to the analysis that limits the holding to noneconomic damages. When considered in the context of *Hannay*, it is clear that the *Hunter* reasoning would preclude

economic loss as well. Like other damages, the wage loss at issue in this case is not itself the bodily injury, but wage loss is one component of the liability that may be incurred by any governmental tortfeasor who causes bodily injury in a motor vehicle collision.

In short, the *Hunter* reasoning would have the illogical effect of immunizing governmental entities from *any* tort liability due to a motor vehicle collision, and the motor vehicle exception of MCL § 691.1405 would not provide any real exception at all. This Court should reject such a convoluted interpretation of the motor vehicle exception in the context of traditional tort law and remedies.

2. The *Hunter* Analysis of “Liable for Bodily Injury” Is Unprecedented

In addition to being illogical and inconsistent with the statutory language, we believe the *Hunter* opinion has the unprecedented and dubious distinction of being the outlier opinion amongst all state jurisdictions in holding that pain and suffering and other noneconomic damages that a person suffers, as a direct result of sustaining a physical bodily injury, are not recoverable as damages for bodily injury.

In contrast, we recognize that the *Wesche* decision does not stand alone in its exclusion of independent loss-of-consortium claims. While some jurisdictions approve loss-of-consortium claims,¹ a number of jurisdictions follow analysis similar to *Wesche*.²

¹ See, e.g., *Galgano v Metro Prop & Cas Ins Co*, 267 Conn 512, 521; 838 A2d 993, 998 (2004)(plaintiff's bodily injury could include emotional distress caused as a result of watching wife die in wreck); *Cady v Allstate Ins Co*, 113 Idaho 667, 669; 747 P2d 76, 78 (1987)(claimed damages for loss of consortium considered as part of bodily injury damages); *Giardino v Fierke*, 160 Ill App 3d 648, 650; 513 NE2d 1168, 1169 (1987)(“loss of consortium” was a “bodily injury damage” as defined in language of insurance policy).

² See, e.g., *Rolette Co v W Cas & Sur Co*, 452 F Supp 125, 130 (DND 1978)(bodily injury did not include nonphysical harm for loss of consortium); *Spaur*, supra,(consortium refers to affection, society, services, companionship, aid and comfort given by a spouse, and therefore is not bodily injury); *Daley v United Services Auto Ass'n*, 312 Md 550, 552; 541 A2d 632, 633 (1988)(consortium-type damages are not bodily injury damages); *New Hampshire Ins Co v*

However, we are not aware of any other jurisdiction that has followed the unprecedented step in *Hunter* and interpreted “liability for bodily injury,” or damages for bodily injury, as precluding economic and noneconomic damages that stem directly from sustaining the physical bodily injury. As the Alaska Supreme Court recognized, “[u]nlike claims for loss of consortium, claims for emotional distress concern injuries that the claimants have suffered directly, rather than derivative injuries that resulted from an injury to another.” *State Farm Mut Auto Ins Co v Lawrence*, 26 P3d 1074, 1079 (Alas 2001).

Some jurisdictions hold that mental and emotional injuries that result in physical manifestations are compensable as “bodily injury” where the emotional injury precedes the physical injury.³ Some jurisdictions preclude recovery for “mental and emotional harm” where

Bisson, 122 NH 747, 748; 449 A2d 1226, 1227 (1982)(loss of consortium is not bodily injury); *Nw Farm Bureau Ins Co v Roberts*, 52 Wash App 888, 889; 765 P2d 328, 330 (1988)(bodily injury did not cover negligent infliction of emotional distress); *Dahlke v State Farm Mut Auto Ins Co*, 451 NW2d 813, 815 (Iowa 1990)(term “bodily injury” does not include the physical manifestations of the parents’ loss of child); *Gonzales v Allstate Ins Co*, 122 NM 137; 921 P2d 944 (1996)(“bodily injury, sickness, disease or death” constitutes injury to the physical body rather than purely mental or emotional injuries); *GEICO v Fetisoff*, 958 F2d 1137; 294 US App DC 279 (DC Cir 1992)(policy defining bodily injury as bodily injury, sickness, or disease, including death, “plainly excludes consortium-type losses”); *Albin v State Farm Mut Auto Ins Co*, 498 So 2d 171 (La Ct App 1986), *writ den* 498 So 2d 1088 (1986)(“bodily injury” generally refers only to injury to the body, or to sickness or disease contracted as a result of injury and, thus, does not include loss of consortium injuries).

³ See e.g. *Mut Serv Cas Ins Co v Co-op Supply, Inc of Dillon, Mont*, 699 F Supp 1438, 1440 (D Mont 1988)(bodily injury did not include claims for humiliation, pain and mental and emotional distress absent physical injury); *Twin City Fire Ins Co v Colonial Life & Acc Ins Co*, 124 F Supp 2d 1243, 1247 (MD Ala 2000)(applying South Carolina law, emotional trauma can constitute “bodily injury” unless the complaint contains no allegations of physical damages); *Am Motorists Ins Co v S Sec Life Ins Co*, 80 F Supp 2d 1280, 1283 (MD Ala 2000)(under Florida law, allegation of physically manifested mental anguish met definition of “bodily injury”); *Gen Star Indem Co v Sch Excess Liab Fund*, 888 F Supp 1022, 1027 (ND Cal 1995)(“Physical injury resulting from emotional distress, however, constitutes ‘bodily injury.’ ”); *State Farm Fire & Cas Co v Nikitow*, 924 P2d 1084, 1089 (Colo Ct App 1995)(although the term “bodily injury” in insurance contract did not encompass purely emotional harm, coverage was available if injury was accompanied by physical manifestations); *Garvis v Employers Mut Cas Co*, 497 NW2d 254,

that harm is caused without a physical bodily injury, or where physical bodily injury is caused by the mental and emotional harm.⁴ But we are unaware of any jurisdiction that precludes recovery for physical and mental pain and suffering sustained by a person as a direct result of a physical injury. It is generally accepted that “pain and suffering, and emotional and mental distress arising out of a physical injury” are recoverable “bodily injury” damages.⁵

257 (Minn 1993)(“emotional distress with appreciable physical manifestations can qualify as a ‘bodily injury’”); *Voorhees v Preferred Mut Ins Co*, 128 NJ 165; 607 A2d 1255, 1262 (1992)(emotional distress resulting in headaches, stomach pains, nausea, and body pains constituted “bodily injury”); *Allstate Ins Co v Wagner-Ellsworth*, 344 Mont 445, 455-56; 188 P3d 1042, 1049 (2008).

⁴ See, e.g., *Nance v Phoenix Ins Co*, 118 Fed Appx 640, 642 (3d Cir 2004); *Natl Fire Ins Co of Hartford v NWM-Oklahoma, LLC, Inc*, 546 F Supp 2d 1238, 1246 (WD Okla 2008); *Home Ins Com v Hartford Fire Ins Co*, 379 F Supp 2d 1282, 1289 (MD Ala 2005), *aff'd sub nom. Home Ins Co v Hartford Fire Ins Co*, 164 Fed Appx 950 (2006); *Mut Serv Cas Ins Co*, supra, p 1438;; *W Am Ins Co v Bank of Isle of Wight*, 673 F Supp 760, 765 (ED Va 1987); *Rolette Co*, supra, p 125;; *Natl Cas Co v Great Sw Fire Ins Co*, 833 P2d 741, 746 (Colo 1992); *Galgano*, supra, p 512; *Cotton States Mut Ins Co v Crosby*, 244 Ga 456; 260 SE2d 860, 862 (1979)—63 (1979); *SCR Med Transp Services, Inc v Browne*, 335 Ill App 3d 585; 781 NE2d 564, 571 (2002); *Armstrong v Federated Mut Ins Co*, 785 NE2d 284, 292 (Ind Ct App 2003)—93 (Ind.Ct.App.2003); *Allstate Ins Co*, supra, p 654; *Garvis, Id.*, p 58; *Citizens Ins Co of Am v Leiendecker*, 962 SW2d 446, 454 (Mo Ct App 1998); *Farm Bureau Ins Co of Nebraska v Martinsen*, 265 Neb 770; 659 NW2d 823, 828 (2003)—29 (2003); *David v Nationwide Mut Ins Co*, 106 Ohio App 3d 298; 665 NE2d 1171, 1173 (1995); *Mellow v Med Malpractice Joint Underwriting Ass'n of Rhode Island*, 567 A2d 367, 368 (RI 1989); *Garrison v Bickford*, 377 SW3d 659, 666-67 (Tenn 2012); *Daley v Allstate Ins Co*, 135 Wash 2d 777; 958 P2d 990, 998 (1998); *Tackett v Am Motorists Ins Co*, 213 W Va 524; 584 SE2d 158, 166 (2003).

⁵ See, *Brua v Minnesota Joint Underwriting Ass'n*, 778 NW2d 294, 300 (Minn 2010)(bodily injury damages include compensation for pain, disability, disfigurement, embarrassment, and emotional distress); *Rawlings v Wabash R Co*, 97 Mo App 511; 71 SW 535, 536 (1903)(pain of mind,— injured feelings,—when connected with bodily injury, is the subject of damages to include for bodily injury); *Voorhees, supra* (“bodily injury” encompasses emotional injuries accompanied by physical manifestations); *Rosman v Trans World Airlines, Inc*, 34 NY2d 385; 314 NE2d 848; 358 NYS2d 97 (1974)(once bodily injury is established, damages sustained as result of bodily injury are compensable, including physical pain and suffering and mental suffering); *Nationwide Mut Ins Co v Lankford*, 118 NC App 368, 369; 455 SE2d 484, 485 (1995)(“Pain and suffering and severe emotional distress” considered a part of recovery for “bodily injury” damages); *Smith v Am Family Mut Ins Co*, 294 NW2d 751, 761 (ND 1980)(recovery for “bodily injury” damages “permitted reasonable compensation for any pain,

As one case in point, Colorado law is illustrative. Colorado law, like *Wesche*, provides that “consortium refers to affection, society, services, companionship, aid and comfort given by a spouse. See CJI-Civ.3d 6:6 (1991). By definition, then, the loss of such consortium is. . . [not] a ‘bodily injury.’” *Spaur v Allstate Ins Co*, 942 P2d 1261, 1264-65 (Colo Ct App 1996). However, at the same time, Colorado law recognizes that liability for “bodily injury” includes recovery for “pain, suffering, mental anguish, fright, distress, and humiliation” incurred as a result of suffering a bodily injury. See *Allstate Ins Co v Troelstrup*, 789 P2d 415, 417 (Colo 1990).

Massachusetts law is also instructive for the proposition that compensatory damages in the form of recovery for physical and mental pain and suffering are allowed for a claim of “bodily injury,” and are not arbitrarily restricted to claims of “personal injury.” Like the analysis

discomfort, fears, anxiety and other emotional distress suffered by the plaintiff and for similar suffering reasonably certain to be experienced in the future from the same cause.”); *World Harvest Church v Grange Mut Cas Co*, No. 13AP-290, 2013 WL 6843615 (Ohio Ct App December 24, 2013) and *Cincinnati Ins Co v Phillips*, 52 Ohio St 3d 162; 556 NE2d 1150, 1151 (1990)(recognizing that “pain and suffering, and emotional and mental distress arising out of the accident” are recoverable “bodily injury” damages); *Lamfu v GuideOne Ins Co*, 131 P3d 712, 716 (Okla Civ App 2005)(compensatory bodily injury damages include lost past wages, pain and suffering, physical impairment, disability, disfigurement, expected future medical expenses, and a loss of future earnings); *Schaedel v Esteves*, No. 61 C.D. 2011, 2011 WL 10819506 (Pa Commw Ct November 3, 2011)(“pain and suffering and loss of wages” can be recovered as part of damages for “bodily injury”); *Padgett v Colonial Wholesale Distrib Co*, 232 SC 593; 103 SE2d 265 (1958)(if bodily injury was proximately caused by the shock, fright, and emotional upset as result of the alleged negligence and willfulness of defendant, plaintiff was entitled to recover such damages as would compensate him for the injuries so sustained); *Hoglund v Dakota Fire Ins Co*, 742 NW2d 853, 858 (SD 2007)(implicitly recognized that claimed damages for pain and suffering, loss of enjoyment of life, permanent injuries and future medical expenses are damages for “bodily injury”); *Weeks v Calderwood*, 191 P3d 1, 3 (Utah 1979)(“[D]amages to compensate the plaintiff for bodily injuries, includ[e] pain and suffering, loss of future earnings and medical and other expenses including such future expenses, as well as loss of future earnings[.]”); *Am Prot Ins Co v McMahan*, 151 Vt 520, 525-26; 562 A2d 462, 466 (1989)(emotional distress damages flowing from bodily injury are compensable as damages for bodily injury); *Bruce v Madden*, 208 Va 636, 639-40; 160 SE2d 137, 139 (1968)(Physical pain and mental anguish usually, and to some extent, necessarily, flow from, or attend, bodily injuries and are compensable); *Daley*, supra at 777(“damages for bodily injury” include damages for emotional distress which arise as a result of a physical injury).

in *Hunter*, Massachusetts law recognizes the distinction between a “personal injury” claim and a “bodily injury” claim:

The term “personal injury” is broader and includes not only physical injury but also any affront or insult to the reputation or sensibilities of a person. “Bodily injury,” by comparison, is a narrow term and encompasses only physical injuries to the body and the consequences thereof.

Allstate Ins Co v Diamant, 401 Mass 654, 656; 518 NE2d 1154, 1156 (1988).

Nevertheless, Massachusetts case law makes clear that mental and physical pain and suffering caused as a result of bodily injury are recoverable in a “claim for bodily injury.” *Id.*, at 654 (damage awards for mental suffering are compensable where they “were connected with, and grew out of, physical injuries”).

In contrast to all of these other analyses, the *Hunter* court’s conclusion that a claim for “bodily injury” precludes recovery for physical pain and suffering and mental and emotional suffering is unprecedented. The *Hunter* analysis runs completely contrary to the logical presumption that a claim for “bodily injury” is brought in order to recover compensatory damages sustained as a direct result of the bodily injury, and those compensatory damages may include economic and noneconomic loss.

Similar to the argument raised in *Hannay*, defendants in *Zurich Am Ins Co v Nokia, Inc.*, 268 SW3d 487, 499-500 (Tex 2008), argued that prejudgment interest was compensation for the lost use of money, an economic injury, and not damages for bodily injury. The Texas Supreme Court rejected this argument and held:

We recently held that prejudgment interest was recoverable under an insurance policy requiring the insurer to pay all sums the insured was legally entitled to recover “because of bodily injury or property damage.” *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 814 (Tex.2006). We rejected the insurer’s argument that prejudgment interest was compensation for lost use of money, not damages from bodily injury, and noted that such a “rigid reading ... would entail splitting hairs even among purely compensatory damages, such as those for mental anguish[.]”. . . *Id.* Instead, we noted that the phrase merely underscored

the fact that the insurance was compensatory, and we concluded that “while it is true that prejudgment interest accrues over time because of lost use of money, it is equally accurate to say that it constitutes additional compensatory damages for the insured's bodily injury and property damage.

Id.

This rather simple and long-followed logic should prevail in this case. Where a person suffers a "bodily injury" within the meaning of the motor vehicle exception to tort immunity, that person should be entitled to recover all of the economic and noneconomic damages otherwise permissible in a tort action in Michigan.

3. The Court Should Clarify That *Wesche* Only Addressed Independent Actions Like Loss-of-Consortium Claims

The *Hunter* panel purportedly based its analysis on this Court's opinion in *Wesche*, which held that an independent and separate claim for “loss of consortium” is not a “bodily injury” for which the motor-vehicle exception waives governmental immunity. *Wesche*, 480 Mich at 79. However, neither *Hunter* nor *Hannay* involve independent and separate actions like the loss-of-consortium claim in *Wesche*.

As a corollary, *Wesche* recognizes that the motor-vehicle exception waives immunity for some damages resulting from bodily injury. So what is the scope of the liability afforded under MCL § 691.1405? The only construction that makes sense is to interpret the phrase "liable for bodily injury ... damage" to permit a person suffering a "bodily injury" to recover all of the economic and non-economic damages resulting from that injury.

The interpretive problem seems to be exacerbated by some unclear language in the *Wesche* decision: "Thus, because loss of consortium is a nonphysical injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity." *Wesche*, 480 Mich at 85. With all due respect to the *Wesche* Court, this sentence is imprecise and confuses damages with the injuries that cause them. Taken to the furthest extent, as

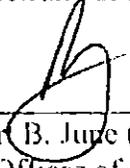
interpreted in *Hunter*, this language has created the argument that each item of damage must itself constitute a bodily injury in order to be compensable under § 1405. We do not believe this was the Court's intent. See, *Wesche*, n 11.

Therefore, we request the Court to clarify its *Wesche* decision to confirm that the motor vehicle exception of MCL § 691.1405 permits a person suffering "bodily injury" within the meaning of that statute to recover all of the economic and noneconomic damages resulting from that bodily injury.

VII. REQUEST FOR RELIEF

For all of these reasons, Amicus Curiae Michigan Association for Justice requests this Honorable Court to affirm the decision of the Michigan Court of Appeals in this case, and to clarify this Court's decision in *Wesche v. Mecosta County Road Commission*, 480 Mich 75, 746 NW2d 847 (2008), by holding that the motor vehicle exception of MCL § 691.1405 permits a person suffering "bodily injury" within the meaning of that statute to recover all of the economic and noneconomic damages resulting from that bodily injury.

Respectfully submitted,



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